[2017] UKFTT 727 (TC)

TC06141

Appeal number: TC/2013/4590

VAT – assessment under s 73 – appellant in breach of unless order – appellant failing to provide proper grounds of appeal – receipts on which assessment based not disclosed - appeal struck out and would have been dismissed if not struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

GREENISH LTD **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Taylor House, Rosebery Avenue, London on 18 September 2017

Mr Isaac and Mr Fox of FTI Fox Consultants for the Appellant

Ms S Skipper, HMRC presenting officer, for the Respondents

DECISION

Background to hearing

1. The appellant was VAT registered for its trade as a Subway franchisee. This appeal was lodged on 11 July 2013 against an assessment dated 11 June 2013 for unpaid VAT of £141,422 which HMRC considered was owed for the periods 11/09 to 03/13. The appellant was granted hardship. In December 2013, the appeal was stayed behind the litigation in *Sub One Ltd*, which concerned a similar assessment against another Subway franchisee. In very broad terms, the outcome of that litigation is that the Court of Appeal upheld HMRC's view of the law and in particular that hot food sold at that Subway franchise was subject to VAT.

2. Following resolution of the *Sub One Ltd* litigation in favour of HMRC, the appellant in 2015 notified the Tribunal that it nevertheless wished to pursue its appeal. The Tribunal pointed out that the appellant had omitted to explain on what grounds it wished to continue its appeal. The appellant's reply appeared to indicate that they did not agree with the quantum of the assessment, but that they had applied for ADR.

3. The tribunal stayed the appeal for ADR but said that it did not accept that the appellant had adequately explained its grounds of appeal, in particular it had not explained why it thought the quantum of assessment was wrong. The appellant explained that its grounds of appeal were that the assessment was not to best judgment because of (alleged) unspecified deficiencies in the manner in which it was raised. Its position was that it had asked for disclosure from HMRC and if it did not obtain the information it had requested, would make an application for disclosure.

4. ADR failed in September 2016. HMRC provided their statement of case on 3 January 2017 in which it was their position that they had provided to the appellant the information which supported the assessments made by HMRC. The Tribunal issued case management directions.

5. Both parties provided a timely list of documents but the appellant complained that HMRC's list did not contain all the information they had previously requested. HMRC provided in time a witness statement from Mr Clark, and detailed their listing information; they also served the bundle, all in accordance with the directions. The appellant did not file any witness statements on the due date nor did it file its listing information.

6. The Tribunal explained to the appellant's representatives that to make an application for disclosure, they must itemise what was required and why it was required. It reminded the appellant of the need for witness statements, which were late; it was explained that the appellant carried the burden of proof and without evidence it would be difficult to succeed in the appeal.

7. As the appellant appeared to be in breach of directions and had not replied to the Tribunal's chasing letter, on 22 May 2017 the Tribunal issued an unless order against the appellant, requiring it by a specified date to notify an intent to pursue the appeal and either to serve witness evidence or explain how it intended to conduct the appeal without witness evidence.

8. Within time permitted by the unless order, the appellant complied with it by serving a witness statement from the appellant's director (Mr K Shahzad). It provided its listing information. It said its witnesses would be Mr Fox and Mr Isaac as well as Mr Shahzad. It applied for a disclosure order against HMRC. That request referred to 12 items and appeared to be in standard form used by the representatives in a number of appeals against assessments on other Subway franchisees.

9. The Tribunal set down the substantive hearing. At the same time it wrote a letter (dated 28 June 2017) stating that the Tribunal considered the 22 May 2017 unless order to be complied with (unless HMRC objected); that it had concerns (a) whether Mr Shahzad's witness statement contained any evidence relevant to the appeal (as it appeared to be no more than a statement that HMRC had not provided the 12 items of information the appellant's representatives had requested) and (b) whether he had actually written it; nevertheless, treating it as a disclosure application, the Tribunal required HMRC to give a response to it. The letter also required the appellant to serve witness statements for Mr Fox and Mr Isaac or state that they were not being called as witnesses but would merely make submissions as the appellant's representatives.

10. The Tribunal had no record that either party complied with the orders in this letter of 28 June 2017. On 1 August 2017, it issued an unless order against both parties requiring compliance.

11. On 14 August, HMRC provided the Tribunal with a copy of a letter they had sent to the Tribunal on 13 July 2017, answering the appellant's disclosure application. (I therefore took it that HMRC had never been in breach of the directions of 28 June 2017 and the unless order against them should be set aside. The appellant did not suggest otherwise). In its response, HMRC provided no new information, stating the required information was in the bundles, or, in respect of other information, that the application was too general to be complied with. The appellant did not respond.

12. HMRC served its skeleton argument, as required by the directions. The appellant did not.

13. As the hearing was shortly due to take place, consideration of the appellant's various defaults was deferred until that hearing.

14. At the hearing I proposed that rather than having a strike out hearing followed (if the appeal was not struck out) by a full hearing, it would be more efficient, because the appellant's ground of appeal (or lack of them) were relevant to the question of whether the appeal should be struck out, for both parties to deal with their full case at this hearing. I would then make a reserved ruling on whether or not the appeal should

be struck out, and if not struck out, I would then determine the appeal. The parties did not object to proceeding in this manner.

HMRC's disclosure

15. At the hearing, I pointed out to Mr Isaac and Mr Fox that, as the appellant had not responded to HMRC's letter of 13 July 2017, the Tribunal had proceeded on the assumption that that letter had resolved its concerns on disclosure and the appeal could proceed.

16. Mr Isaac's reaction was to disagree: his explanation was that he had not responded to that letter because he had not received it. Ms Skipper produced evidence it had been sent to the correct email address. Mr Isaac's reaction then was to accept it had been sent to the correct email address, but stated in any event he had not read it.

17. Mr Fox indicated that the appellant would want an adjournment to consider the letter. I pointed out that I would consider making a wasted costs order against the representatives personally if the hearing was adjourned simply to enable them to read and consider a letter which had been sent to them two months' earlier. I also asked them to consider the letter on the spot, as it might be that they could form a view that an adjournment was not required, or at the very least would enable me to form some sort of a view on whether a lack of information from HMRC was hampering the appellant's case.

18. So Mr Fox and Mr Isaac then went through each item of HMRC's response to their 12 requests; and after a short break to consult their client, they informed me that no application for adjournment would be made. At that point in the hearing, it was not apparent to me that HMRC had failed to disclose any relevant documents: later on in the hearing it became apparent that one set of relevant documents (the receipts) had not been disclosed and I deal with that issue below.

Whether appeal should be struck out?

The legal test

19. The unless order of 28 June 2013 only stated that the appeal 'may' be struck out if the order was not complied with by the due date. The appeal had therefore not automatically struck out. This was not a case where the appellant was applying for relief from sanctions, but a case where the Tribunal was considering whether to impose the sanction of strike out.

20. Nevertheless, it seems to me that similar considerations would apply in both situations, as long as I remain conscious that sanctions have not yet been imposed and it may not be appropriate to apply any sanctions. The Supreme Court in *BPP* [2017] UKSC 55 which was similarly a case where a 'may' Rule 8(3)(a) unless order had been imposed certainly appeared to consider the guidance in court cases on relief

from sanctions was relevant but not binding on this Tribunal. As the Supreme Court said:

> [26]....In a nutshell, the cases on time-limits and sanctions in the CPR do not apply directly, but the Tribunals should generally follow a similar approach.

21. The leading case in the courts on cases involving relief from sanction is *Denton* [2014] EWCA Civ 906. At [24] the court said:

> .....A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]".

22. So I will consider the seriousness of the breach, why it occurred, and then all relevant factors, before deciding whether it is right to strike out the appeal.

The seriousness of the breach

23. I have above outlined the series of events which led to the appellant's breach of the unless order of 28 June 2017. It was in breach of the order because, by the due date, it had neither served statements from two persons it had said would be its witnesses (Mr Fox and Mr Isaac) nor retracted its statement that they would be witnesses.

24. The Unless Order was ultimately complied with very late because, at the hearing, Mr Fox and Mr Isaac confirmed that neither of them would give evidence but would merely make submissions to the Tribunal on behalf of their client.

25. This was not a trivial breach. The order required compliance by 14 August 2017 and there was no compliance until the hearing on 18 September, despite compliance being very simple. But without the appellant's explanation that it was *not* calling Mr Isaac and Mr Fox as witnesses, HMRC had been left in doubt about what the appellant's case was and how to prepare their own case. That doubt lasted until after the hearing commenced. Fairness in litigation makes it essential that each party makes it clear what their case is long before it reaches the day of the hearing because otherwise the other party is deprived of the ability to properly prepare its own case.

26. As Mr Isaac and Mr Fox regularly represent litigants in appeals in this Tribunal they must be thought to understand (and clearly did understand) the difference between witnesses and representatives, so their statement that they would be witnesses had to be taken seriously. This was why the Tribunal asked for clarification. The failure to provide that clarification until the hearing meant that HMRC had uncertainty hanging over them during preparation of their case.

27. Should it have been obvious to the Tribunal and HMRC that Mr Fox and Mr Isaac would not give evidence? While it is unusual for representatives to give evidence, it is not precluded and it does happen in some cases in this Tribunal. Mr Fox and Mr Isaac might, for instance, have carried out their own invigilation exercise on the appellant and have wished to give evidence about it. So I do not think that it should have been obvious to HMRC or the Tribunal that the statement that Mr Isaac and Mr Fox were to be witnesses was an incorrect statement.

28. So the failure to clarify that statement when asked to do so potentially put HMRC at a disadvantage in preparing for the hearing and was therefore a serious breach, albeit not of the most serious in that the appellant did not actually introduce new evidence at the hearing. But the breach was more than merely trivial.

The explanation for the breach

29. The above letter and unless order were not the only things Mr Isaac accepted had been emailed to him but which he had not read. As I have already said, he did not read HMRC's 13 July response to his disclosure request. He had not read HMRC's skeleton argument either, although again he accepted Ms Skipper could produce (electronically) evidence she had sent it to the correct email address.

30. Mr Isaac's explanation for his failure to respond to the Tribunal's letter of 28 June 2017 and the Unless Order of 1 August 2017, and the other matters, was that he had a backlog of emails because he had been on holiday and so he hadn't read any emails from the Tribunal. Later on he also said that he had a problem with receiving emails because his electronic mailbox had exceeded its capacity, although he had (he said) made an effort to deal with this by deleting some emails. However, he did not seem to know whether any particular email had not been received by him because his mailbox was too full, or whether it had been received and he just hadn't got around to reading it.

31. I found his explanation for the breach quite extraordinary as it appeared to be nothing less than an admission of negligence in his representation of his client. Mr Isaac had agreed to represent Greenish Ltd in this Tribunal and yet he had ignored emails from the Tribunal and HMRC and/or, having elected to correspond electronically, had not taken timely steps to ensure that he has sufficient email capacity to receive emails that might be sent to him.

32. Had he belonged to a professional body, his admissions about how he conducted his business in this Tribunal would no doubt have been grounds for his client to complain about him to that body. But, he informed me, he is unregulated.

33. The failures of its representative should not necessarily be visited on the appellant; nevertheless, it seems to me that where a person chooses to be represented by another, that person is to a large extent adopting its representative's acts as its own. In general, it would be unfair to the defendant if, while the appellant's representative's compliant actions are attributed to the appellant, the representative's defaults are not. And in this case, the appellant's director did not attend the hearing nor given any reason for his

non-attendance, and therefore was not in a position to explain to what extent (if any) he was aware of his representative's defaults and to what extent (if any) he had done anything to correct the situation. In these circumstances, I consider that it is only fair to HMRC to treat FTI Fox Consultants' defaults as defaults of the appellant.

34. In conclusion, the appellant has no acceptable excuse for its breach of the unless order. Its representative's attitude to compliance with tribunal orders, was, to say the least, far too casual.

Collective proportionality

35. It is important that the parties to litigation recognise that Tribunal orders should be complied with: this factor tends to imposing sanctions for non-compliance, particularly where there is no good excuse for non-compliance because otherwise the Tribunal would only reinforce a casual attitude to compliance. Overlooking such non-compliance would encourage future non-compliance by the parties to this appeal, and more generally.

Course of Conduct

36. This was not the only non-compliance by the appellant. There was earlier, rather minor compliance. It had in June accepted its non-compliance in failing to provide its listing information by the due date. I am prepared to accept, however, that, contrary to what appeared to be the position at the time (see §§6-7) there was no non-compliance with regards to the provision of Mr Shahzad's witness statement, as it appears Mr Isaac had provided Mr Shahzad's witness statement to HMRC by the due date (although the Tribunal had had no contemporaneous record of this which was why the first unless order was issued).

37. But Mr Isaac admitted he had failed to prepare and serve a skeleton argument, his excuse being that he was too busy. This was more serious non-compliance as it left HMRC in the dark as to the appellant's case; this was a particular concern as, as I have said, this was a case where the appellant's grounds had been left very vague.

Prejudice to appellant and prospects of success

38. If the appellant is struck out, then it must pay the assessment the subject of the appeal. It loses the chance to put its case.

39. While that seems to be severely prejudicial to it, and a factor which would militate against the appeal being struck out, such a strike out is only prejudicial to the extent the appellant's case has a prospect of success. If its case is hopeless, then there is no prejudice to the appellant if it is struck out.

Conclusion

40. As I explained at the hearing, I reserved my decision on whether to strike out the appellant so that I could hear the subject matter of the appeal and reach a conclusion

on the appellant's prospects of success. And I reach my conclusion on whether to impose the sanction of strike out having considered the case as a whole, in order to determine the appellant's prospects of success: see §120 below.

The evidence

The appellant's lack of evidence

41. As I have said, Mr Shahzad, the appellant's director, did not attend the hearing. Mr Isaac informed me that he had originally expected Mr Shahzad to attend, but had received an email that morning from Mr Shahzad stating, without giving any reason, that he would not be coming. Mr Isaac did not apply for an adjournment (and indeed that was probably wise in the absence of any reason for Mr Shahzad's absence).

42. I was not addressed on the weight to be placed on Mr Shahzad's evidence contained in his witness statement. He was not present to be cross examined. He had not signed his statement nor made a statement of truth. The statement simply re-stated the demands for the 12 items of disclosure mentioned above at §9 and gave Mr Shahzad's opinion that the appellant could not defend the assessment in the absence of disclosure by HMRC, and that the assessment was not to best judgment.

43. As had already been explained in a letter to the appellant from the Tribunal, this 'witness statement' did not really contain any evidence relevant to the issues before the Tribunal: so the question of weight to be applied to it was really irrelevant. The only sentence which might be said to contain relevant evidence was Mr Shahzad's statement that 'our own version of quantum is far less than what HMRC have purported it to be' but this was too vague for any weight to be placed on it and is strictly irrelevant anyway, as the appellant must prove the correct quantum (and not merely that HMRC's quantum is too high). I discount his evidence entirely.

44. So far as documentary evidence was concerned, in the hearing the appellant's representatives referred me, save as specified in this paragraph, only to documents provided by HMRC. Mr Isaac had produced at the hearing (without warning) a 'bundle of documents' but this contained only copies of papers on the tribunal file, together with a few pages relating to the ADR process (which were irrelevant to the appeal). During the hearing, he also produced copies of various HMRC manuals, which HMRC did not object to being relied on. He also produced a blank invigilation sheet as an example, he said, of what he would have expected HMRC to be able to produce, completed, in this case. It was not relevant.

45. So, in conclusion, the appellant produced no relevant evidence in support of its appeal.

HMRC's evidence

46. The only relevant evidence to which I was referred was produced by HMRC in the form of Mr Clark's oral and written evidence, and the documents, such as the invigilation notes, produced by Mr Clark and other officers and the schedules of

receipts (referred to below) prepared by Mr Clark, all of which were contained in the Bundles.

47. I deal separately with the receipts which HMRC accepted, as became apparent, were not contained in the bundle and had not been disclosed to the appellant.

Findings of fact

48. The below findings of fact are therefore based on the evidence in the documents bundle and Mr Clark's oral and written evidence, which I accept, as it was consistent with the documents and appeared to me to be careful and truthful.

The reason why the appellant's compliance was tested

49. HMRC became concerned in 2007 that many Subway franchises might not be declaring the correct amount of VAT. HMRC carried out invigilation exercises on some Subway franchises based in London during 2008-2011 which showed standard rated sales in the region of 75-90% of total sales, which was higher than many franchisees were declaring. Mr Clark had concerns that the software provided to the franchisees by the franchisor tended to default to 'zero rated' where the sales person failed to indicate the nature of the sale.

50. Mr Clark had included in his statement a chart and pie graph showing the (anonymous) results from these other Subway franchises. He was challenged on this evidence by Mr Fox, who pointed out that the appellant had no way of verifying whether it was accurate.

51. Mr Fox was correct on this: but it is irrelevant. Whether or not the chart and pie graph of other Subway franchisees' percentage of standard rated sales were accurate was not the question: the question was whether the assessments on the appellant were to best judgment and whether they could be shown to be wrong. The pie graph only explained why Mr Clark had chosen to carry out invigilations on the appellant and other Subway franchisees.

52. The appellant's VAT returns since registration in 2009 showed standard rated sales as being in the region of 38-50% of sales. Mr Clark was concerned that this was too low, compared to the invigilation results of other Subway franchisees, and issued a letter to the appellant on 5 October 2012 asking them if they had any admissions of under-declarations to make.

The invigilation exercises

53. The appellant's then representative notified Mr Clark on 22 November 2012 that there had been no under-declarations. Concerned that this was not correct, Mr Clark decided to undertake invigilation exercises at the appellant company's two retail premises.

54. I accept Mr Clark's evidence that his motive in carrying out the invigilation exercise was to check the accuracy of the appellant's VAT returns. It was not suggested to him, in any event, that he had any other motive.

55. Mr Clark arrived unannounced on 28 January 2013 at the appellant's Wembley premises and undertook an invigilation exercise with Officer Clayton. He did the same (with a different officer) on 6 February 2013 at the appellant's Neasden premises.

56. The two exercises, in Mr Clark's view, demonstrated significant under-declarations by the appellant. He wrote to the appellant proposing that all past VAT returns be re-calculated with an average of 87% standard rates sales. The appellant by its representative rejected Mr Clark's views.

57. Mr Clark decided to undertake more invigilations to obtain a more representative sample. Mr Clark and Mr Clayton undertook a second invigilation at Wembley on 16 April 2013; on 1 May 2013, a second invigilation was undertaken at Neasden by Mr Clayton and Mr Conquest, while on the same day Mr O'Connell and Mr Berry conducted an invigilation at Wembley. On 10 May 2013 Officer Baptiste and Ahmed conducted the third invigilation at Neasden.

58. The appellant did not allege that these invigilations did not take place: Mr Fox' criticisms were that the officers had not properly recorded the invigilations in accordance with HMRC's manuals and that because of this the appellant had been unable to check the accuracy of the assessments.

59. Mr Clark was challenged over the invigilation notes, their legibility and whether they had properly identified the appellant. It was his position that they were in accordance with HMRC's requirements although he accepted that there were no notes for three of the invigilations (Neasden 2 & 3 and Wembley 3). Later in the hearing, Mr Fox pointed out that the contemporaneous note of the 1 May 2013 visit to Neasden appeared to refer to the second officer by a different surname to that used in Mr Clark's witness statement, and that the handwriting on one note was so poor that that the appellant's trading address '45 Bridge Road' looked like '45 Bridce Road'. Mr Clark was not given the opportunity to comment on either of these matters, and it was certainly not suggested to him that the invigilations had not taken place.

60. I find that the invigilation exercises took place as Mr Clark described. His evidence on this was not challenged.

61. The more relevant challenge to the invigilation notes was that they were very brief and did not contain any figures from which anyone could draw conclusions as to the mix of standard rated to zero rated sales.

62. Mr Clark's explanation was, as the notes themselves described, that the exercise had involved the trader handing the HMRC officer standing by the till a duplicate receipt for every transaction. The HMRC officer then annotated the receipt by hand to show whether the sale was an eat in or take out, hot food or cold food. So it was true to say that the invigilation note was very brief and did not contain any figures

from which the assessment was calculated: all that information was contained on the annotated receipts.

63. His explanation for his colleagues' failure to create or retain the 3 'missing' invigilation notes was that the significant part of the invigilation was the obtaining and annotating the receipts. It was his evidence that this happened in all 6 cases, and that his assessment was based on the percentages obtained from those six batches of receipts as annotated.

64. I accept Mr Clark's evidence. There were some obvious failures in HMRC's record keeping, most glaringly the absence of 3 invigilation notes, however brief they would have been. But this did not detract from the overall position that HMRC had taken six sets of annotated receipts during the six invigilations which the appellant accepted had taken place, and all of which receipts Mr Clark had used to calculate the assessment.

The results of the invigilations

65. Mr Clark's evidence was that the Wembley invigilations (in date order) produced results of 94%, 97% and 92% of standard rated sales; the Neasden invigilations (in date order) produced results of 80%, 86%, and 89% of standard rated sales. Mr Clark calculated that the average of these figures was 89% of standard rated sales.

66. The appellant's then representative wrote in response to Mr Clark's report on this to suggest why HMRC's figures might be wrong. Mr Clark's witness statement explained why he discounted these views: his explanation seems reasonable and in any event he was not challenged on it. He wrote to the trader at the time explaining his views.

67. On 11 June 2013, he issued his assessment. He made the assumption that the level of standard rated sales was constant. This was a reasonable assumption in the absence of any evidence to the contrary, and one on which he was not challenged. It meant that he assessed the appellant on the basis of 89% standard rated sales back to its commencement of trading in 11/09.

68. On 19 July 2013, he responded to further comments by the director, Mr Shahzad. In this email, he specifically referred to the receipts obtained in the invigilation exercises, and explained that the schedules he enclosed were based upon them. At no point did the appellant provide any new evidence to HMRC, despite the invitation to do so. Mr Clark did not revise his assessment and the appellant lodged an appeal.

The significance of the receipts

69. The receipts were not in the bundle. Their significance only appeared to become apparent to those representing the appellant during Mr Clark's oral evidence. They had not mentioned them earlier in the hearing when complaining that HMRC had not made full disclosure to them: but by the end of the hearing, it was the appellant's position that, because the receipts had not been disclosed, the appeal should be

allowed. The appellant, however, did not apply for disclosure of the receipts and adjournment of the hearing.

70. But I have to consider the relevance of the receipts, and their non-disclosure to the appellant, to the issues in this appeal. Even though the appellant did not apply for adjournment, I could, if I considered it in the interests of justice to do so, order adjournment and discovery on it becoming apparent that HMRC had not disclosed something relevant to the appeal. Moreover, the appellant's breach of the unless order and other directions of this tribunal (such as for a skeleton argument) referred to above should be weighed against any breach by HMRC of directions.

71. So I needed to consider whether (a) HMRC ought to have disclosed the receipts and (b) whether the absence of the receipts was likely to hinder the appellant's appeal such that it was in the interests of justice to adjourn the hearing and order them to be produced.

Was HMRC in breach of directions?

72. HMRC had been directed (a) in the Tribunal's standard directions referred to at §4 to disclose documents on which they relied in this appeal and (b) in the letter of 28 June 2017 to reply to the appellant's application for disclosure (discussed above at §§9-11).

73. HMRC were not in breach of the Tribunal's standard disclosure direction. HMRC were not relying on the receipts in the hearing, and so did not need to disclose them under that direction.

74. The appellant had requested disclosure of 12 items and HMRC were directed to reply to the request. I find that none of the items requested specifically referred to the receipts. The appellant had asked for the missing invigilation notes, but since the disclosed invigilation notes expressly referred to the receipts, if it was the receipts the appellant had required, they should have expressly said so. More significantly, the last request was for 'all documentation not yet disclosed' which was so general it must be interpreted as covering the receipts, but HMRC had replied to this request stating they had disclosed all documents on which they relied in the appeal, and would deal with any specific disclosure request for an item when made. That reply complied with the Tribunal's direction (which had only required HMRC to reply to the request rather than to actually provide disclosure). As I have already said, the appellant did not follow up HMRC's reply to its request so even if the appellant did not consider this reply adequate, it had never communicated this to HMRC. No order for disclosure for all relevant documents was made so I find HMRC were not in breach of direction for failing to produce the receipts.

75. Should HMRC nevertheless be criticised for failing to disclose the receipts to the appellant?

76. Mr Clark was aware of the significance of the annotated receipts to his calculations, but he was not aware they were not in the bundles. Ms Skipper's

position was that HMRC did not rely on the receipts and had not placed them on their list of documents or included them in the bundle because they were voluminous (some 2000) so they chose instead to rely on Mr Clark's schedules of them. The schedules were disclosed and were in the bundles. In circumstances where (a) there was no order to disclose them, (b) the appellant had made no specific challenge to the accuracy of the schedules, and (c) had not requested the receipts, I do not consider it right to criticise HMRC for failing to produce the receipts.

Should the appellant bear some responsibility for the absence of the receipts?

77. On the contrary, I find that the appellant and its representatives ought to have known that the assessment was based on the receipts. Firstly, the appellant (via its employees) created the duplicate receipts for HMRC in the first place, during the invigilations. Then shortly after the last invigilation, on 19 July 2013, Mr Clark had emailed his schedules (based on the receipts) to the appellant and explained they were based on the receipts obtained at the invigilations (see §68). Later on, during disclosure, the appellant was provided with the three invigilation notes. They are short. What content they have is mostly about the annotation of the receipts. Similarly, the schedules were disclosed. They are on their face a list of receipts.

78. So the relevance of the receipts to the appellant ought to have been obvious to the appellant and its advisers from the beginning: it was apparent on the documents disclosed to them. Yet at no point had they chosen to ask for copies of them. I accept Mr Clark's evidence that if the appellant had asked for the receipts, he would have provided it with copies.

79. It seemed to me more likely that the appellant and its representatives had never engaged with the basis of the assessment at all, had never made any attempt to put forward a more accurate picture of the company's liability, but had been content throughout the appeal to do no more than repeat a generalised and non-specific complaint, duplicated in a number of other appeals with the same representative, stating that the appellant had not had enough information from HMRC.

Did the absence of the receipts hamper the appellant's case?

80. The appellant put forward two grounds of appeal, albeit lacking in any specifics: the first was that the assessment was not to best judgment and the second was that the assessment was incorrect. Did the absence of the receipts hamper its ability to put forward either of its grounds of appeal?

81. It had HMRC's schedules, and it had the originals of the receipts (as HMRC had only ever had duplicates). The only information which it lacked was the handwritten annotations on each receipt as to whether the sale was treated by HMRC as takeaway/eat in, and hot or cold (in other words, standard rated or zero rated). However, a comparison of HMRC's schedules to the original receipts would necessarily indicate which transactions HMRC considered carried more VAT than the appellant had declared: if the appellant considered that HMRC had got it wrong, they

were therefore in a position to challenge this even in the absence of the annotated receipts.

82. It seems to me the only missing piece of information was the grounds on which HMRC considered any particular sale to be standard rated rather than zero rated: was it because it was eat in or because it was hot? But I do not see how this information could have been useful in defending the appeal: either the appellant could lead evidence that it was cold take out or it could not. And as I have said, it led no evidence at all.

83. In conclusion, it is difficult to see how the absence of the receipts hampered the appellant in putting forward its own case, and certainly the appellant did not suggest how it did so.

84. In these circumstances where (a) HMRC were not in breach of any disclosure direction, (b) the appellant did not seek adjournment and disclosure, (c) the appellant was clearly throughout the appeal on notice of the relevance of the receipts to the assessment yet had never asked for copies of them and (d) it was difficult to see what relevant additional information was contained in the receipts which HMRC's disclosure had not already given the appellant, I considered that it was in the interests of justice to decide whether to strike out the appeal, and if not, whether to allow or dismiss the appeal, on the evidence before me and not order adjournment and disclosure.

Burden of proof

85. It is well established and the appellant's representative accepted, that the burden of proof is on the taxpayer to displace the assessment. HMRC do not have to prove the assessment is right; the appellant must prove that it is out of time, or not to best judgment, or the extent to which it is wrong. There is a good reason for this. Only the appellant knows its true liability as it runs its own business and keeps its own books.

86. The appellant's case is that it had proved that the assessment was wrong because it had shown that the receipts on which the assessment had been based were not available in the hearing. It had proved, Mr Isaac said, that HMRC could not prove that the assessment was correct.

87. That is, of course, to totally misunderstand the meaning of burden of proof. It might have been correct to say that in the absence of the receipts HMRC could not prove that the assessment was correctly calculated (although that itself was debatable as the evidence included the schedules and Mr Clark's written and oral evidence on how they were compiled). But even if the appellant was right to say that HMRC could not prove that the assessment was right, HMRC did not need to prove that the assessment was correct. The appellant had to challenge the assessment, which meant the appellant had to satisfy the Tribunal it was not to best judgment or the extent to which it was wrong.

88. And the absence of the receipts did not prove that either way: the schedules may have been 100% right or may have included errors. Without the receipts, I could not know either way. So the appellant had proved nothing by pointing to the absence of receipts. I had no evidence that the schedules on which the assessment was based were wrong.

89. So the absence of the receipts did not prove the appellant's case. I go on to consider whether for any other reason the appellant was able to successfully challenge the assessment.

Was the assessment in time?

90. At no point in its notice of appeal or at any time until the hearing did the appellant raise the question of the timeliness of the assessment. HMRC nevertheless had chosen to address the issue of timeliness in their skeleton.

91. VAT assessments have to comply with two time limits, that contained in s 73(6) and that contained in s 77(1) Value Added Tax Act 1994 ('VATA').

92. S 73(6) contains two alternative time-limits and HMRC only has to meet one. HMRC relied on s 73(6)(b) which required an assessment to be made within one year of facts sufficient to justify the assessment coming to HMRC's knowledge. The appellant said it relied on s 73(6)(a) which required an assessment to be within 2 years of the end of the prescribed accounting period. Certainly, a part of the assessment breached the two year rule. But that is quite irrelevant if HMRC met the alternative s 73(6)(b) time limit.

93. And I agree with HMRC that the assessment was in time under s 73(6)(b). The assessment made was one which was based on the results of the 6 invigilation exercises. Therefore, the one year in s 73(6)(b) had to be measured from no earlier than the date of last invigilation exercise, which was 10 May 2013. The assessment was raised on 11 June 2013. It was well in time.

94. The other applicable time limit is contained in S 77(1) which only permits assessments within 4 years of the end of the prescribed accounting period. The assessment was made on 11 June 2013. The earliest accounting period assessed was 11/09. The 11/09 accounting period ended on 30 November 2009: that was less than four years before the assessment. So the assessment was in time under s 77(1).

95. In conclusion, in so far as the issue is whether I should impose the sanction of striking out, I find that any case that the assessment was out of time is without a reasonable prospect of success; in so far as the appeal against the assessment is concerned, if I did not strike out the appeal, I would dismiss the case that the assessment was out of time.

Was the assessment to best judgment?

Procedure

96. Lord Justice Carnwath in the leading case of *Pegasus Birds Ltd* (above) said:

> Where the taxpayer seeks to challenge the assessment as a whole on 'best of their judgment' grounds, it is essential that the grounds are clearly and fully stated before the hearing begins.

97. Ms Skipper pointed out that the appellant had not done this. I agree; while the appellant had often stated that its grounds of appeal were that the assessment was not to best judgment and made generalised statements such as 'the assessments...were in no way in accordance with any known fact...' it had never properly particularised why it considered that they were not to best judgment.

98. Properly, therefore, I should not consider this ground of appeal but I will do so as, to the extent the appellant raised it as a ground of appeal in the hearing, it was clear that it was not a ground of appeal with a reasonable prospect of success and I am in a position to deal with the submissions: so even if HMRC were ambushed by the appellant's case, it did not put them at a disadvantage.

The legal test

99. The significance of a finding that an assessment is not to best judgment is that it means the assessment has not met the requirements of s 73: the effect is that the entire assessment is void, irrespective of whether there was unpaid tax to assess. And while discharging an assessment for not being within s 73 would not prevent HMRC re-assessing the taxpayer, in practical terms, by the time a tribunal has made such a decision, HMRC are normally out of time to re-assess and certainly would be in this case.

100. It follows that Parliament did not intend s 73 to be interpreted in such a way that mere errors in an assessment would be enough to make the assessment void.

101. In the case of *Van Boeckel* [1981] STC 290 Woolf J said:

> 'What the words 'best of their judgment' envisage...is that [HMRC] will fairly consider all material before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of the tax which is due. As long as there is some material on which the commissioners can reasonably act, then they are not required to carry out investigations which may or may not result in further material being placed before them'.

102. Carnwath J said in *Rahman t/a Khayam Restaurant* at §6:

> I have referred to the judgement [of Woolf J] in some detail, because there are dangers in taking Woolf J's analysis of the concept of best judgment out of context. The Tribunal should not treat an assessment as invalid merely because it disagrees as to how that judgment should

> have been exercised. A much stronger finding is required; for example, that the assessment has been reached 'dishonestly or vindictively or capriciously'; or is a 'spurious estimate or guess in which all elements of judgment are missing'; or is wholly unreasonable. In substance, these tests are indistinguishable from the familiar *Wednesbury* principles...Short of such a finding there is no justification for setting aside the assessment.

103. I mention in passing that Ms Skipper referred me to page 5 of a Tribunal decision *McCourtie* 12239 where the VAT Tribunal chairman had, as part of her consideration of whether an assessment was to best judgment, added a gloss to what was said by Mr Justice Woolf in *Van Boeckel* :

> 'In addition to the conclusions drawn by Woolf J in *Van Boeckel* earlier tribunal decisions identified three further propositions of relevant in determining whether an assessment is reasonable. These are, first that the facts should be objectively gathered and intelligently interpreted; secondly, that the calculations should be arithmetically sound; and finally, that any sampling technique should be representative and free from bias.'

104. I said in the hearing that I doubted that this was a correct statement of the law, whether or not it was a correct summary of earlier tribunal decisions. On reflection, I maintain that view. Binding decisions of superior courts such as those cited above in *Van Boeckel* and *Rahman,* have made it clear that the test is akin to that of public law: an assessment to 'best of their judgement' is something of a misnomer as the officer is not required to make the best possible estimate of liability on the information in front of him. He is simply required not to be arbitrary or to guess, he must not act from wrong motives (such as vindictively), and he is required not to act wholly unreasonably. But he is not required to be as right as it is possible to be: his assessment can contain mathematical errors and a sampling technique can be less than perfect.

105. So I move on to consider whether the appellant has made out a case that the assessment was not to best judgement.

HMRC's motivation

106. The appellant did not make a clearly articulated allegation that HMRC had raised the assessments from any wrong motive, or indeed for any reason other than to make good to the exchequer the loss through the appellant's apparent failure to fully declare its standard rated sales. I have found that the invigilation checks on the appellant were to find out if the appellant had been under-declaring its VAT liability, and the assessments were made to rectify the under-declarations which Mr Clark identified during the invigilations. Mr Clark's motives were entirely proper.

Were the assessments reasonable and not arbitrary?

107. My view is that any suggestion that the assessments were arbitrary and not reasonable is hopeless: I have found that the assessments were based on the average of no less than 6 invigilations of the appellant's business.

108. When the appellant complained that the assessments were at significant variance to its own calculation of its liability, it did not provide any estimate of liability. Presumably it was referring to its VAT returns. But the degree of variation between a trader's self assessments and an HMRC assessment in no way tends to prove that the assessment was not to best judgment.

109. It might be said that an assessment is not to best judgment if based on other traders' results, although there might be circumstances where it was appropriate to make an assessment on that basis. Nevertheless, to the extent this was a ground of appeal, I dismiss it. I have accepted Mr Clark's evidence that, while it was the results from invigilations of other Subway franchisees which led him to look closely at the appellant in this case, the actual assessments on the appellant were based entirely on the results of the invigilation exercises conducted on the appellant.

Conclusion on 'best judgment'

110. In so far as the appellant's case was that the assessment was not to the best of the officer's judgement, for the reasons given above, I consider its case to be without any reasonable prospect of success; determining the matter, I find that it has not made out a case that the assessment was not to best judgment and dismiss its case on this.

Was the assessment correct?

111. While an assessment may be to best judgment, that does not mean that it is necessarily correct. It may contain arithmetical errors; the sampling exercise may have been flawed. It may simply be that an assessment to best judgment is shown to be an inaccurate assessment because later evidence from the appellant may show a more accurate picture of the appellant's liability.

112. But as I have said, the appellant must prove the extent to which the assessment is wrong. There is a good reason for this. Only the appellant knows its true liability as it runs its own business and keeps its own books.

113. And as Lord Justice Carnwath (as he was then) said in *Pegasus Birds* the Tribunal's normal focus in an appeal against an assessment is the correct tax liability and not whether the assessment was to best judgment:

> The Tribunal should remember that its primary task is to find the correct amount of tax as far as possible, on the material properly available to it, the burden resting on the taxpayer....

Errors in the assessment?

114. The appellant identified no arithmetical or other errors in the assessment. I find that none have been proved.

Evidence of actual liability?

115. The appellant has to show its correct liability in order to displace an assessment made to best judgment. Here the appellant gave no evidence at all so I was unable to form a more accurate view of the appellant's actual liability.

116. I had absolutely nothing before me from which I could conclude that the appellant's liability had been demonstrated to be less than the assessment.

117. Neither was I addressed on the law on which the assessments were based. HMRC had clearly proceeded on the basis that eat-in sales, or take-away sales of hot food, were standard rated, as were sales of bottled water. That is consistent with Group 1 of Sch 8 of VATA (zero rating of food) which provides that supplies in the course of catering are standard rated, and which defined 'in the course of catering' as including any supply of food for consumption on the premises, and any supply of hot food wherever consumed. The *Subone* litigation had concerned the definition of 'hot food' and, as I have said, had upheld HMRC's view. Bottled water was specifically stated to be standard rated in Group 1.

118. The appellant did not suggest that HMRC's categorisation of its supplies or its interpretation of the law on this was incorrect. It did not lead any evidence at all and so it was unable to support, and did not make out, any case that sales which HMRC had treated as standard rated were properly zero rated.

119. Its case that the assessment was wrong was without a reasonable prospect of success; moreover, if the appeal is not struck out, I would determine this appeal by upholding the assessment.

Overall conclusion

120. I consider that this appeal should be struck out. The appellant was in breach of an unless order: while its failure to comply was relatively minor, it was one of a number of failures to state its case to HMRC. And that was against a background of a failure by the appellant to ever give clear grounds of appeal: all the appellant had ever done in this appeal was to re-state its (in my view unfounded) complaint in generalised terms that HMRC had not given it enough information to check the validity of the assessment. It had never chosen to address the correctness of the actual assessment in this case despite being provided with sufficient material to do so. I have also found that its appeal was without reasonable prospect of success, and I have not found that HMRC were in breach of any directions. In all these circumstances, the appeal should be struck out.

121. However, if I had not struck out the appeal, I would have dismissed it. the appellant has not shown that the assessment was out of time, or that it was not to best judgement; nor has it shown that the assessment should have been in a lower amount.

122. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Barbara Mosedale
TRIBUNAL JUDGE

RELEASE DATE: 3 October 2017